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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 91

NORTON I. KRETSKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

Petitioner was charged, together with one De Pietro, in an indictment returned in the United States District Court for the Northern District of Illinois, with unlawfully receiving and concealing four paintings of the value of more than $5,000, which had moved in interstate commerce from Bardstown, Kentucky, to Chicago, Illinois, the defendants knowing that the paintings had been stolen (R. 3). After a jury trial De Pietro was acquitted, but petitioner was found guilty and sentenced to six years' imprisonment (R. 800, 809).

Pertinent evidence adduced at the trial in October 1953 may be summarized as follows:

On or about November 13, 1952, the four paintings involved (Gov. Exhibits 1–4) were stolen from St. Joseph's Old Cathedral in Bardstown, Kentucky (R. 26–27). Three of the paintings were reported to have been the gifts of King Louis Phillippe of France and Francis, King of the Two Sicilies (R. 29–30).

In November 1952 government witness Lafitte was hired in an investigative capacity to assist in the recovery of the stolen paintings (R. 49, 68). On April 1, 1953, Lafitte in New York City received a long-distance phone call from a man he later learned to be petitioner, who asked if he were speaking to "Gus," to which Lafitte replied, "Yes." Petitioner stated that he wanted to do business about the paintings, and Lafitte arranged to fly to Chicago the next day. (R. 47, 48, 49.)

On April 2 Lafitte, in the presence of F. B. I. agents, phoned petitioner telling him to come to the Drake Hotel in Chicago (R. 50, 99–100, 151). When petitioner arrived, he introduced a friend under the name Mark. Lafitte used the name Gus Manoletti. Petitioner gave his attorney's card to Lafitte, who expressed surprise that he was talking to a lawyer. (R. 51–53, 83.) Later, when petitioner and Lafitte went to the Chez Paree nightclub, Lafitte asked if there was any "blood" on the picture. Petitioner replied, "No, my boy got the picture—cut the picture from the frame, and the job he done in a safe way, and nobody be hung." (R. 54.)

On April 3, after Lafitte had breakfast with petitioner and his friend Mark, they drove to De Pietro's apartment building, where petitioner displayed the stolen paintings (R. 54–56, 80–81, 92–93). In negotiating regarding the price of the paintings, petitioner at first demanded $100,000, explaining that "his boy, the man who robbed, who took the pictures out, had to have the most part of the money." Lafitte offered $35,000 and a compromise of $40,000 resulted. (R. 57–59.)

At about 4 p. m. that day, Lafitte, who had rented a car, returned with petitioner to the apartment. De Pietro carried the pictures, which were placed in the back of the car. When Lafitte said that De Pietro was a good man, petitioner stated, "I have got a good man. I have got to give him a cut in here somewhere. * * * when we make a deal we will give him a cut, a good piece." Petitioner assured Lafitte that they were going to "make a deal" and that he knew "a lot of hoodlums". (R. 60–62.)

When the car arrived at the parking lot of the Palmolive Building, Lafitte gave a prearranged signal to F. B. I. agents, who arrested petitioner and recovered the stolen paintings (R. 62, 104, 110–111, 119, 153).

Petitioner testified in his own defense that he was merely acting as an attorney for Ratner, an alleged art dealer, who asked him to store the pictures at his home. Instead, petitioner arranged with De Pietro to do the storing. (R. 607,

608, 611.) Petitioner stated that he did not ask Ratner the terms of the consignment under which the pictures were held or who the owner was (R. 660). Petitioner testified that the first time he learned that the paintings were stolen was after his arrest (R. 633, 644). Petitioner denied saying to Lafitte that his boy cut the picture from the frame and did a safe job so that nobody would be hung (R. 623–624); denied informing Lafitte that he would have to give De Pietro a cut (R. 632); and denied telling an F. B. I. agent that he was "through" and would lose his attorney's license (R. 675–676).

On direct examination Lafitte testified that he had been a special investigator for the Federal Bureau of Narcotics for three years; that prior to that time he had worked for several years abroad in the same capacity; and that about 15 months before trial, he had been employed by the F. B. I. (R. 45–46). On cross-examination he testified that he had been an investigator for the federal government for thirteen years (R. 66). Later in the cross-examination, the following occurred (R. 86):

> By Mr. GLADSTONE:
>
> Q. Mr. Lafitte, you went to work for the government, you say, fourteen years ago. What was your first work for the government?
>
> A. I was a special investigator.
>
> * * * * *

By Mr. GLADSTONE:

Q. With what department?

By Mr. WARD. I object to that, Your Honor. It is a matter of public interest, in which there are certain matters that should not be disclosed.

By the COURT. Sustained.

By Mr. GLADSTONE:

Q. You were in Europe on investigations by the Government?

By Mr. WARD. Objection, your Honor, again. It is a question of public interest.

By the COURT. Sustained.

By Mr. WARD. He testified to that in chief, and anything further should not be disclosed, it is a matter of public interest.

By the COURT. Sustained.

In his closing argument to the jury, government counsel referred to Lafitte as having worked for three years for the Federal Bureau of Narcotics and for ten years before that in investigatory capacities abroad for the government (R. 722).

After conviction, counsel for Kretske made a motion for a new trial (R. 810–836) alleging that, in the course of legal research, he had read the case of *United States* v. *Sansone,* 206 F. 2d 86 (C. A. 2), a narcotics case, and discovered that one Pierre Lafitte had there testified for the government; that after examining a photograph of the Lafitte who testified in the *Sansone* trial, he believed him to be the one who testified at the Kretske trial. From the testimony of Pierre Lafitte in the *Sansone* case it appeared that he

had been deported from the United States in 1921, and that in 1951 he was in the custody of immigration officials at Ellis Island under a warrant of deportation when he turned informer in the narcotics case (R. 824); that he had been convicted of a crime in New York City in 1921 (R. 825) and from 1924 to 1929 of various crimes in Europe (R. 834); and that he had remained in the United States since 1936 (R. 830).

At the hearing on the motion, government counsel took the stand and testified that he had been advised by the United States Marshal's office and the Federal Bureau of Investigation that there was no evidence of any fingerprints or of any criminal past of the witness Lafitte;[1] that the reason he objected to the cross-examination of Lafitte as to his work for the government was that Lafitte had told him "that approximately ten years preceding his engagement with the Bureau of Narcotics, he had served the United States in a confidential mission or missions abroad, and that he was under instructions from certain officials in Washington not to divulge the nature and extent of his work for the government" (R. 790–791).

The court overruled the motion (R. 836). The Court of Appeals affirmed, stating that "new

[1] The fingerprints had been sent in, under the name of Manoletti, after Lafitte had been arrested with petitioner on April 3, 1953 (R. 783). We have been informed by the F. B. I. that an error was made in failing to effect an identification of "Manoletti's" fingerprints with those of Lafitte, and that before the appeal was argued government counsel were informed of Lafitte's prior criminal record.

trials are not ordinarily granted where the newly discovered evidence is merely of an impeaching character" (Pet. 30).[2]

DISCUSSION

We have ascertained that the Lafitte who testified at the *Sansone* trial is the same person who was the principal government witness at this trial. The government, we now know, gave erroneous information to the court and the jury in affirmatively presenting Lafitte's testimony that he had worked for the government in an investigatory capacity abroad for ten years prior to his employment as a special agent in the *Sansone* case, and in foreclosing cross-examination concerning such activities by objecting on the ground of the public interest. In view of that fact, and the importance of Lafitte as a witness, we do not deem this a case of harmless error, even though the evidence clearly points to petitioner's guilt.

Under the circumstances, the government consents to the granting of the petition for certiorari and the remand of the cause for a new trial.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

AUGUST 1955.

[2] The opinion (Pet. App. 25–33) is reported at 220 F. 2d 785.

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